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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE CHRYSLER-DODGE-JEEP ECODIESEL® MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

This Document Relates to:

ALL ACTIONS

Case No. 3:17-md-02777-EMC

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND ATTORNEYS' FEES AND COSTS UNDER FED. R. CIV. P. 23(e), 23(h), AND PRETRIAL ORDER NOS. 3 AND 4

Hearing: May 3, 2019
Time: 10:00 a.m.
Courtroom: 5, 17th Floor

The Honorable Edward M. Chen

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INTRODUCTION

The proposed Class Action Settlement secures significant and immediate relief for the Class and the environment. Class Members will receive "substantial cash payment[s]" (Dkt. No. 526 at 14) that "exceed [the] economic harm suffered" under Plaintiffs' damages theory "in nearly all cases" (Dkt. No. 491-3 ¶ 46). If all Class Members participate, these payments will total $307,460,800 in compensation to the Class. In addition, the Settlement, along with the US-CA Consent Decree,[1] provides free vehicle repairs designed to ensure the Class Vehicles' compliance with emissions regulations, as well as a robust extended warranty valued at $239.5 million that protects all parts and systems implicated in the litigation and potentially affected by the repairs. As an added benefit to the Class, Defendants will also pay all costs of notice and administration and Class Counsel's reasonable attorneys' fees and costs as approved by the Court. *See* Dkt. No. 508 ¶¶ 5.6, 8.4, 11.1. To begin the emissions repair and compensation programs promptly, the Claims Portal will go live immediately upon the Court's approval of the Class Settlement and the Consent Decree; that is, as early as May 3, 2019, if approvals are given that day.

By all accounts, this is an exceptional outcome in the resolution of difficult and fiercely contested claims, and one reached after extensive arm's-length negotiations. The Class overwhelmingly agrees. The robust, Court-approved notice program has been fully implemented and has delivered individual notice to more than 100,000 Class Members. Nearly 34,000 of them have already registered their interest on the Settlement website even though the claims portal has yet to open and will remain open for two years after final approval, if granted. In contrast, only three Class Members have objected to any aspect of the Settlement, and, as shown below, the three objectors (though well meaning) raise no issues undercutting the fairness, reasonableness, or adequacy of the proposed Settlement. This high level of engagement and remarkably low level of opposition is a strong endorsement of the Settlement terms.

[1] All capitalized terms have the meaning ascribed in the Settlement and Plaintiffs' Motion for Final Approval of Class Action Settlement and Attorneys' Fees and Costs under Fed. R. Civ. P. 23(e), 23(h), and Pretrial Order Nos. 3 and 4 (Dkt. No. 538; the "Motion"), unless otherwise indicated.

This significant result was not easily won. Plaintiffs' claims were hotly contested and vigorously litigated for nearly two years. For that work, and the results achieved, Class Counsel seek $66 million in attorneys' fees and costs. As set forth in Plaintiffs' Motion, this request satisfies all criteria of Rule 23 and the Ninth Circuit jurisprudence and is well within the range of reasonableness. Not a single class member argues otherwise.

Thus, for all the reasons in Plaintiffs' Motion and as set forth further below, Plaintiffs respectfully request that the Court grant final approval of the proposed Settlement and approve Class Counsel's reasonable request for attorneys' fees and costs, and modest service awards for the Settlement Class Representatives.

ARGUMENT

I. The Settlement is Fair, Adequate, and Reasonable.

At the final approval stage, the primary inquiry is "whether a proposed settlement is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (citation omitted). In making this determination, the question the court must answer "is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Id.* at 1027.

Under recently-revised Rule 23(e) and this District's *Procedural Guidance for Class Action Settlements*, searching scrutiny of proposed class settlements occurs up front, at the preliminary stage; the court must find it will be likely to approve the settlement and certify the class for settlement purposes before class notice is sent. Fed. R. Civ. P. 23(e)(2).

Here, the Court has made both such findings. It analyzed all Rule 23(e), 23(a)(1)-(4), and 23(b)(3) settlement and certification factors, found that settlement approval and certification would likely be granted, and concluded in its preliminary Rule 23(e) Order that the "proposed settlement between the parties is sufficiently fair, adequate, and reasonable." Dkt. No. 526 at 15. As Plaintiffs demonstrated in their Motion, this remains true, and the Settlement easily satisfies all relevant factors under the Federal Rules and *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). *See, e.g.*, Dkt. No. 538 at 11-17; *see also* Declaration of Professor Robert Klonoff Relating to Class Action Settlement Fairness ("Klonoff Decl.") (Exhibit A). The

overwhelming majority of the Class agrees, and the few who do not raise no concerns that counsel against final approval.

A. The Class' positive response to the Settlement strongly supports final approval.

In its preliminary Rule 23(e) Order, the Court observed that the Settlement's substantial benefits were "likely to gain [Class Members'] attention." Dkt. No. 526 at 13. This prediction proved prescient. Virtually all of the Class received direct, individualized notice through the Court-approved noticed program (*see* Supplemental Declaration of Steven Weisbrot ("Weisbrot Decl.") (Exhibit B) ¶¶ 6-10, 33),[2] and many Class Members are already actively engaged. As of April 25, 2019, there have been 80,989 unique visits to the Settlement website, and 33,804 Class Members have registered to receive updates about the Settlement. *Id.* ¶¶ 25-26. This is impressive, since this sizable engagement has occurred before the Claims Portal was open, or the two year claims period has even begun.

In contrast, approximately 3,461 individuals—less than 3% of all potential Class Members—sought to exclude themselves from the Settlement Class.[3] It is worth noting, however, that the *vast* majority of these opt-out requests resulted from vigorous marketing and solicitation campaigns by a handful of attorneys and are not necessarily reflective of Class Members' dissatisfaction with the Settlement.[4] Indeed, of the 3,461 exclusion requests, 3,061 (88%) were submitted *en masse* by only two law firms,[5] and only 14 (<1%) were submitted by individual Class Members. Weisbrot Decl. ¶ 31. Furthermore, many of the opt outs, upon further

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[2] Angeion, the court-appointed Notice Administrator, successfully sent 135,536 direct notices via mail and 115,824 direct notices via email to potential Class Members. Weisbrot Decl. ¶¶ 6-10.

[3] This conservative figure includes all timely, non-duplicative opt-out requests received. The Parties' review of these requests remains ongoing, but as of now, the claims administrator has determined that 415 of the requests are incomplete or appear to have been submitted by non-Class Members. Weisbrot Decl. ¶ 29. The claims administrator has contacted deficient opt-outs and provided a deadline by which to rectify deficiencies. *Id.* ¶ 30. Thus, the actual number of valid Class Member opt outs may ultimately fall below the current count. The Parties will report a final count of valid opt outs at the final approval hearing on May 3, 2019.

[4] *See, e.g.*, http://www.yourlegaljustice.com/ecodiesel-fraud-compensation-mass-tort-lawsuit-lawyers/.

[5] Those two law firms are Stern Law PLLC and Heygood Orr & Pearson, who submitted 1,841 and 1,220 requests, respectively. Weisbrot Decl. ¶ 31.

reflection, may ultimately determine that they want to participate in the Settlement at some point during the claim period, as was the case for many class members in the *Volkswagen "Clean Diesel"* settlements. *See In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2016 WL 6248426, at *16 (N.D. Cal. Oct. 25, 2016), *aff'd*, 895 F.3d 597 (9th Cir. 2018). Regardless, even at face value, this relatively small number of opt-outs favors final approval. *See, e.g.*, *id.* (collecting cases); *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (holding that the absence of negative reaction strongly supports settlement and approving a settlement with an opt-out rate of 4.86%); Klonoff Decl. ¶ 49.

Even more remarkably, only *three* class members voiced any opposition to the Class Settlement. By way of comparison, the 2.0-liter *Volkswagen* settlement received 462 objections. *In re: Volkswagen*, 2016 WL 6248426, at *16. Under any circumstances, this extremely low objection rate would strongly favor final approval, and it does so with particular force here given the well-publicized nature of this litigation and the significant sums at stake. *See, e.g.*, *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004); *Cruz v. Sky Chefs, Inc.*, No. C-12-02705 DMR, 2014 WL 7247065, at *5 (N.D. Cal. Dec. 19, 2014) ("A court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it."); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members."); *see also* Klonoff Decl. ¶¶ 45-48.

Equally as important, and as detailed further below, none of the three objections undermine the Settlement's fairness or otherwise counsel against final approval.

B. The Settlement fairly compensates class members.

No matter the strengths of a settlement, "[s]ome class members will inevitably wish they could recover more." *In re: Volkswagen*, 2016 WL 6248426, at *18. Objectors Andrew Cindric Jr. and Laura Tuschhoff fall into this camp. *See* Dkt. Nos. 547, 550.

Cindric, for example, believes that current, original owners should receive the full MSRP value of the EcoDiesel premium (in his case, $4,500), and not the $3,075 to which they are entitled under the Settlement. *See* Dkt. No. 550. This objection misunderstands the nature of the alleged overpayment damages. *See* Klonoff Decl. ¶¶ 58-59. To begin, as economist Ted Stockton noted, "consumers generally received some discount off of the list prices," and a 10% discount of the MSRP cost for the EcoDiesel option is "conventional" and "conservative" based on the transaction-level data in this case. Dkt. No. 491-3 ¶ 29. In Cindric's case, therefore, the starting place for the alleged overpayment is $4,050, not $4,500. *Id.* But even more importantly, the value of the EcoDiesel premium is experienced—and must be amortized—over the entire lifespan of the vehicle, which Stockton pegged conservatively at eight years based on industry sources. *Id.* ¶ 33. Critically, here, the Settlement provides a repair that delivers to Class Members the vehicles they thought they were purchasing originally. Thus, Class Members' overpayment damages correlate not to the entire EcoDiesel premium, but to the portion of it that was unrealized before the fix was available. Cidric, who was one of the earliest purchasers of a Class Vehicle, will have owned his vehicle for approximately 5.5 years by the time the fix becomes available (assuming final approval is granted). At most, then, his *full* overpayment damages are $2,784.38 ($4,050 x (5.5 years owned / 8 year lifespan)), which is significantly less than what he stands to receive under Settlement. *See id.* ¶¶ 35-37. For this reason, Stockton opined that, even setting aside all the other Settlement benefits, the cash compensation alone "exceed[s] the economic harm suffered" in "nearly all cases." *Id.* ¶ 46; *see also* Klonoff Decl. ¶ 59.

Tuschhoff, the other objector addressing Settlement compensation, believes that the $990 compensation for former owners is insufficient, based primarily on her frustration with maintenance issues she experienced with the exhaust gas recirculation system in her Class Vehicle. *See* Dkt. No. 547. These issues, she claims, ultimately convinced her to trade in her vehicle for an "[un]fair price" at some point after July 2017 (after this litigation had been consolidated and leadership appointed). *Id.* Now, knowing that the Settlement provides an

emissions repair and extended warranty, she wishes she had not sold her vehicle and would like more compensation. This objection is off base for a number of reasons.

First, the Settlement compensation is appropriately designed to compensate Class Members for overpayment damages incurred in purchasing or leasing a Class Vehicle with an undisclosed emissions cheating system. Routine maintenance and repairs that did not arise from Defendants' undisclosed emissions manipulation are part and parcel of vehicle ownership generally and unrelated to the issues in this case. *See In re: Volkswagen*, 2016 WL 6248426, at *20-21; Klonoff Decl. ¶ 54. It is worth noting, moreover, that all of Tuschhoff's repairs appear to have been covered under warranty, and as she notes, had she kept the vehicle, she would have been entitled to a robust extended warranty covering all emissions-related parts and systems (that warranty will be available for whoever currently owns the vehicle). Her regrets about her personal decision not to await the resolution of this litigation do not undermine the fairness of the Settlement or its compensation structure.

Second, Tuschhoff provides no information for the Court to assess whether she did in fact receive an unfair price for her vehicle. Even if she had, Plaintiffs did not pursue a "diminished value" damages theory because there was no evidence that the emissions cheating scheme at issue in this litigation depressed the Vehicles' market value (and no other member of the Class has claimed otherwise). *See* Klonoff Decl. ¶ 54. In any case, if Tuschhoff believed that the Class Settlement did not account for her own individualized experiences with her Class Vehicle, she could have opted out of the Settlement and pursued her claim individually. *See* Klonoff Decl. ¶ 56. Instead, and more constructively, there is every reason to believe that all three objectors will participate, claim, and receive their owner and former owner settlement benefits.

In sum, no submission has demonstrated that the Settlement provides anything less than the full economic harm Class Members suffered as a result of their overpayment for vehicles with undisclosed emissions cheating software. But even if they had, "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (citation omitted); *see also, e.g.*, *Nat'l Rural Telecomms.*, 221 F.R.D. at 527 ("[I]t is well-

settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial."); *Van Lith v. iHeartMedia + Entm't, Inc.*, No. 1:16-CV-00066-SKO, 2017 WL 4340337, at *12 (E.D. Cal. Sept. 29, 2017); *Villanueva v. Morpho Detection, Inc.*, No. 13-cv-05390-HSG, 2016 WL 1070523 at *4 (N.D. Cal. March 18, 2016); *Ebarle v. Lifelock, Inc.*, No. 15-CV-00258-HSG, 2016 WL 5076203, at *5 (N.D. Cal. Sept. 20, 2016). The compensation offered here is substantial and—in combination with the other benefits secured by the Settlement—reflects a fair, reasonable, and adequate compromise of heavily-contested claims.

C. Extensive, years-long testing confirms that the AEM will not affect the vehicles' "key vehicle attributes" or "average fuel economy."

The third objector, Gary Henning, is concerned that the AEM will "substantially affect[]" the Vehicles' "MPG and performance" based on his perception that the modified vehicles in the 2.0-liter *Volkswagen* settlement experienced similar issues. *See* Dkt. No. 551. This concern is misguided. For starters, the comparison to *Volkswagen* is, in this context, apples-to-oranges. *See* Klonoff Decl. ¶ 57. The repair in *Volkswagen* involved significant hardware and software modifications, whereas here, the AEM requires only a software reflash. *Compare* Notice of Lodging of Partial Settlement Decree, *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 3:15-md-02672, Dkt. No. 1605-1, Appendix B at 15-23 (explaining certain necessary hardware modifications as part of the vehicle fix in that case) *with* Dkt. No. 542 at 3 (explaining the fix this in this case is a "software fix for the Subject Vehicles"). Moreover, in this case, the EPA and CARB—which hold the regulatory authority governing the AEM—have already performed extensive, years-long testing on the fix and have concluded that the AEM will not change the Vehicles' "reliability, durability, vehicle performance," "average fuel economy," or "other driving characteristics." Dkt. No. 545-1, Appendix D. The extensive regulatory testing, and the Plaintiffs' experts' involvement in vetting and evaluating the results, provides strong assurance of the effectiveness of the AEM. And even if the AEM were to cause minor variations in certain characteristics in a particular vehicle, such variations are more than covered by the generous compensation offered to all Class Members

who still own their vehicles. Finally, if for some reason the modification causes an irreparable failure in the vehicle, the AEM Extended Warranty includes a buyback protection. Dkt. No. 508 ¶ 4.3.2(d).

II. The Uncontested Fee, Costs, and Service Award Requests are Fair, Reasonable, and Appropriate.

As with approving a class action settlement, the Court's role in evaluating Class Counsel's fee request is to determine whether the amount requested is "'fundamentally fair, adequate, and reasonable.'" *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. P. 23(e)). Class Counsel's requested fees and costs—all of which will be paid *in addition to* the benefits available to the Class—easily meet this standard for all the reasons set forth in Plaintiffs' Motion. Even under the most conservative valuations of the Settlement, Class Counsel's requested fee percentage remains well below the 25% benchmark for attorney's fees in common fund cases in this Circuit, as well as the mean and median percentages in similar cases across the country. *See, e.g.*, Dkt. No. 538-2 ¶¶ 23-26 (discussing several empirical studies calculating mean and median percentages); *see also* Klonoff Decl. ¶ 31. The multiplier resulting from a lodestar cross-check is also significantly below the average for comparable cases. *See* Dkt. No. 538-2 ¶¶ 34-35.

This is more than justified given the intensity of the litigation, the quality of the work, and most importantly, the results achieved. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (the relief obtained for the class is the single most important factor in evaluating the reasonableness of a requested fee). Again, the Class agrees, and the fact that not a single class member objected to Class Counsel's request provides "strong, positive" evidence "supporting class counsel's requested fees." *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2017 WL 2178787, at *3 (N.D. Cal. May 17, 2017). The modest service awards request for the Settlement Class Representatives—to be paid by Defendants in addition to the Class compensation—is likewise reasonable and unopposed.

III. The Settlement Class Should Be Certified.

For all the reasons set forth in the Preliminary Rule 23(e) Order and Plaintiffs' Motion, the proposed Settlement Class satisfies all requirements of Rule 23, and should be certified. Dkt. Nos. 527 ¶ 6; 538 at 7-11. No objector argues otherwise.

CONCLUSION

Settlement Class Representatives and Settlement Class Counsel respectfully request that the Court certify the Settlement Class and confirm the appointment of Settlement Class Counsel and the Settlement Class Representatives; grant final approval of the Settlement; award $59 million in attorneys' fees and $7 million in costs to be allocated by Lead Counsel among the PSC firms and additional counsel performing work under Pretrial Order Nos. 3 and 4; and approve service awards of $5,000 to each Settlement Class Representative.

Dated: April 25, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 25, 2019, service of this document was accomplished pursuant to the Court's electronic filing procedures by filing this document through the ECF system.

/s/ *Elizabeth J. Cabraser*
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